United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1242

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff

-v-

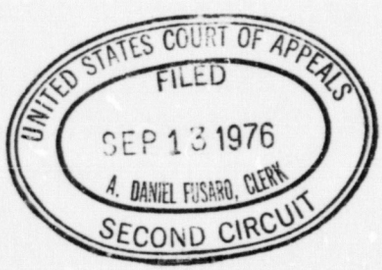
Docket No. 76-1242

WAYNE F. HENRY,

Defendant - Appellant

BRIEF FOR APPELLANT

Criminal No. 74 - 194



Respectfully submitted,

JOHN MANNING REGAN, ESQ.
Attorney for Defendant-Appellant
Office and P.O. Address
711 Wilder Building
Rochester, New York 14614
Telephone : (716) 546 - 7110

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ISSUES PRESENTED

1. Whether sub-division (a) (1) of Section 812, Section 811, and Section 841 of Title 21 of the United States Code, which make possession, with intent to dispense a controlled substance, a crime, violate Article I, Section 1, of the Constitution of the United States, in that those sections delegate to an agency of the Executive Branch of Government, to wit: the Department of Justice of the United States, the legislative power to create a crime.

2. Whether, on the evidence below, the Government proved its case beyond a reasonable doubt.

STATEMENT OF THE CASE

In July, 1974, the United States Grand Jury for the Western District of New York, indicted defendant , WAYNE F. HENRY, on three counts : (1) Conspiracy to violate Title 21, U.S. Code 841 (a) (1) ; (2) knowingly and intentionally violating Title 21 U.S. Code 841 (a) (1), by dispensing and distributing methaqualone, a Schedule II controlled substance, and (3) violating Title 21 U.S. Code 841 (a) (1) by knowingly and intentionally possessing, with intent to distribute and dispense, methaqualone, a controlled substance.

The case was tried in January, 1976, before the Hon. Harold P. Burke, without a jury. Judgment of conviction was rendered against the defendant in May, 1976.

On May 10, 1976, Judge Harold P. Burke sentenced the defendant to serve one year and one day on each count, sentences to run concurrently.

During the trial of Henry, the government produced as witnesses the undercover officers, and the co-defendants. Generally, the evidence established that Klinkert and Henry were co-workers with one Duane E. Baldwin at Pennwalt Corporation in the Town of Henrietta, Monroe County, New York. Baldwin was the only person who had prior familiarity with drugs. In his testimony, Baldwin admitted this on direct examination as follows :

TRANSCRIPT

Q. Were there any other times, in addition to the time that you have already testified to, that you and Mr. Henry took substances from Pennwalt Laboratories ?

A. No. There was no other time.

Q. Were there other times when you, yourself took substances from Pennwalt.?

A. Yes.

Q. Were there any other times when you and Mr. Henry sold any substances obtained from Pennwalt?

A. No.

Q. This was the only time ?

A. Yes.

Baldwin had sold drugs to an undercover agent named Carmen Martucio on prior occasions.

Consequently, the evidence which the Government adduced established that it was Baldwin who made contact with the prospective buyers of the drugs, and made all the arrangements necessary to consummate the purchase. The government's testimony merely establishes that Henry was only the custodian of what was taken from the Pennwalt Plant in late February, 1974. It was also Baldwin who admitted that he had taken substances from the Pennwalt Plant on earlier occasions, and that, on such occasions, he had not had the assistance of either Klinkert or Henry .

At the time of the seizure and arrest , the government confiscated seven (7) bags. Some were opaque white or gray plastic. Some were transparent clear plastic. Exhibit 10, their D. E. A. report, establishes that although seven (7) bags were seized, only three contained methaqualone. The other four contained inert brown resin. To the naked eye, all of the bags contained the same brown resin. Chemical analysis detected the methaqualone.

Henry defended on the basis of the fact that he believed, at the time he participated in the theft of the brown resin substance, that it was inert. Moreover, Dr. William Head, of the Pennwalt Pharmaceutical Corporation, testified that all

methaqualone had been removed from the premises no later than January, 1974, a month BEFORE the theft took place. Henry also testified he brought only some of the bags to the place where the sale-transaction was to occur. Baldwin and Klinkert had brought the other bags.

Under these circumstances, defendant argued below, and argues here, that the government failed to prove BEYOND A REASONABLE DOUBT that what Henry had taken from the Pennwalt Corporation, and what he had brought to the scene of the proposed sale, was, in fact, the brown resin substance that contained methaqualone.

At the close of the Government's case, the defendant, by counsel, moved for the dismissal of the indictment upon the additional ground that the law contained an improper delegation of legislative power from the Congress to the Department of Justice. The Brief that follows shall amplify that point.

POINT I

SECTIONS 811, 812 AND 841 OF TITLE 21 OF THE UNITED STATES CODE VIOLATE THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES :

1) THEY AUTHORIZE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO THE EXECUTIVE BRANCH OF GOVERNMENT

2) THEY FAIL TO GIVE ADEQUATE NOTICE TO THE ORDINARY MAN OF WHAT SUBSTANCES ARE CONTROLLED.

3) THEY FATALLY COMBINE THE LEGISLATIVE AND EXECUTIVE FUNCTIONS IN THE DEPARTMENT OF JUSTICE - THE PROSECUTING AGENCY.

The Congressional scheme outlined in the Comprehensive Drug Abuse Prevention and Control Act of 1970 , (84 Stat 1242) sought many objectives. Control of dangerous drugs was a primary goal. The legislation divided its methods of control. It sought to PREVENT abuse of dangerous drugs through close registration and regulation of manufacture, transportation, and handling. It devised a reporting system, and an elaborate system to keep dangerous drugs where they belong .

Also, it sought to CORRECT abuse of dangerous drugs, through the imposition of criminal penalties on those who distributed, dispensed, or possessed them outside the approved administrative channels. See House of Representatives, Report of Interstate and Foreign Commerce Committee, No. 91-1444, 9/10/70, to accompany H.R. 18583 ; 3 U.S. Code Congressional and Administration News, pp. 4566 - 4657 (1970).

This point shall argue that the Congress delegated its legislative power under Article I, Section 1, of the United States Constitution to the Attorney General

of the United States, and the United States Department of Justice, in one segment of this Drug Control legislation, and that such delegation violated Article I, Section 1, of the Constitution of the United States.

The defendant does not complain about the drugs Congress specified in the original law. (See United States Code, Title 21, Section 812 (b)). Defendant complains that he has defended against possession of a controlled substance, - METHAQUALONE, that CONGRESS never classified as a Schedule II substance. The Department of Justice and the Attorney General made that classification, and exercised that judgment, not the Congress.

On April 6, 1973, the Department of Justice under Section 811 of Title 21 gave Federal Register notice of its intent to classify methaqualone as a Schedule II drug. After the hearings under the Administrative Procedure Act were completed, - and these were the first CONTESTED hearings under the new Drug Abuse Law, the Department of Justice made methaqualone a Schedule II controlled substance, effective October 4, 1973. See Federal Register, Vol. 38, No. 192, 10/4/73.

This followed the procedure the House Report described, as follows :

> " A procedure is established for classification of future drugs which create abuse problems. ... if the Attorney General feels that a drug should be controlled ... he will request a scientific and medical evaluation by the Secretary of HEW. If the Secretary of HEW determines, on the basis of these, and any other data, that the drug should not be controlled, the Attorney General may NOT control the drug ; otherwise, the Attorney General may publish notice in the Federal Register, and proceed in accordance with rule-making procedures, which provide notice and opportunity to be heard, to list the drug for control. "

These procedures suffice to compel civil compliance by private citizens , engaged in the business of manufacturing, or transporting, or selling drugs, with the stringent regulations the drug laws require. It also suffices to make such persons expend the time and money necessary to effect compliance. But, it does NOT suffice to create the crime described in Section 841 (a) (1), nor to make this defendant liable for the penalties imposed under Section 841 (b) of Title 21, because Article I, section 1, says Congress alone may legislate, and because DECIDING WHAT DRUGS IT SHALL BE A CRIME TO POSSESS AND DISPENSE is wholly and solely a Legislative judgment WHEN SUCH DISPENSING OR POSSESSING IS THE CRIME !!

There can be no standards of delegated judgment adequately precise to the exercise of this kind of legislative power. The criteria set out in Title 21, Section 812 (b) 2, - even though they be the will of Congress - merely elaborate on the process of a judgment which is essentially legislative. They exude penultimate conclusions, not properties, or characteristics, which can reliably be delegated to an administrator to find. They are cognate predicates - part of the legislative process itself, not guidelines an agent can infallibly follow.

In the Senate Judiciary Committee's report on the companion bill (S. 3246) the comprehensive standards of Section 811 (c) were discussed. At least nine (9) specific standards had to be met BEFORE the Attorney General could classify a drug as controlled. See Senate Judiciary Committee Report No. 91-613, 12/16/69, pp. 14-16, 101-103. Those standards recited evidentiary facts, and scientific back-ups, as a pre-condition to classification. But the law, as enacted, adopts a

SUBJECTIVE test, - requiring the Attorney General in Section 811 (c) of Title 21, merely to CONSIDER these items, not to develop the evidence, and find that they do, in fact, exist. This is inadequate to the ministerial task allowed, because it enables the subjective judgment of a minister to become law.

This is all the more disturbing since :

> " It is a fundamental dogma of our law that no more in the domain of the criminal or penal branch of jurisprudence than in any other branch of it can there be a valid delegation of legislative authority, but the requirement is probably more rigid in criminal than in civil matters that legislation of the character of penal enactment should emanate directly from the ordinary organ of supreme legislative power within the State." Prather -v- United States, 9 App. D.C. 82 (1896)

* * *

The issue here is not unlike that in United States -v- Sharpnack, 355 U.S. 286 (1958). In Sharpnack, the Court upheld the Federal Assimilative Crimes Act which adopted, for Federal enclaves within a State, the criminal laws of that State when no federal criminal law applied. But Sharpnack contained very important distinctions :

(1) Territorially, the enclave was within the legislative jurisdiction of the State, and

(2) the delegation was to a LEGISLATIVE body.

Notwithstanding these differences, Justice Douglas and Black dissented in Sharpnack. That dissenting opinion, citing Youngstown Sheet and Tube -v- Sawyer, 343 U.S. 579, and Knickerbocker Ice -v- Stewart, 253 U.S. 149, presents cogently the argument this defendant now makes :

> " The power to make laws under which men are punishe for crime calls for as serious a deliberation as the fashioning of rules for the seizure of industrial plants, ... (it) calls for the exercise of legislative judgment ... " 355 U.S. 297, 298

* * *

There are two further points of objection :

(1) The procedure does nt give due notice of the classification - (nor were the laws' own publication standards met), and

(2) the delegation of power to create the crime went to that agency charged with the responsibility to prosecute the crime.

The duty of reasonable notice for a criminal statute is a truism of due process that needs no citation. We observe this truism today with all the sacred veneration appropriate to a discarded relic.

Firstly, the republication standards set out in Section 812 (a) were never met - vague as they are. Moreover, the notice and hearing procedures of the Administrative Procedure Act are NOT calculated to NOTIFY the public of new behavior classed as criminal.

In this case, not even the arresting officers knew what the brown resin contained. Exhibit 10 proves they thought it was phentermine. Yet this defendant is convicted of dispensing methaqualone - an entirely different substance. And the conviction stands - even in the face of testimony from an impartial witness that there was no methaqualone on the premises at the time of the theft, and despite the paucity of notice that methaqualone was a controlled substance.

In this case, Dr. Head of the Pennwalt Pharmaceutical Corporation stated he read the Federal Regis[illegible] daily to keep up with re-classifications of controlled substances.

Is this the duty the criminal law now fixes on the public in order to escape severe criminal penalties for possession of drugs ? Compare the notice in fact sustained against the defendants in United States -v- Benish, 389 F. Supp. 557, (W.D. Pa. - 1975).

* * *

The combination of sovereign power in the Attorney General's office which this legislation achieves is simply appalling. While cases such as Ex Parte Grossman, 267 U.S. 87 (1925) have emphasized the need for cooperation among the independent and interdependent branches of government, none has sustained the delegation to the prosecutor of the power to make the criminal law.

Such a delegation is a fundamental violation of the doctrine of separation of powers so touted in our textbooks , and so ignored in our governmental institutions.

POINT II

THE GOVERNMENT FAILED TO PROVE THE CHARGE BEYOND A REASONABLE DOUBT

At the trial, the Government attempted to prove the charges upon the following facts :

On or about May 30, 1974, at the home of Jonathan Klinkert, in Webster, New York, defendant, Wayne F. Henry, Jonathan Klinkert and Dwayne Baldwin, in Klinkert's garage, sold to one Ronald Martin, an undercover agent of the New York State Police, on loan to the Federal Government Drug Enforcement Administration, a quantity of a controlled substance, to wit: methaqualone.

Agent Martin's evidence established that the controlled substance appeared to be brown granules or a "brown substance". Martin testified to conversations with the three defendants, which conversations were filled with references to "speed". Martin said he offered Four Thousand Dollars ($ 4,000.00) for twenty (20) pounds of SPEED, and at least one of the defendants insisted on Fifty-five Hundred Dollars ($5,500.00) for the same twenty (20) pounds of SPEED. He testified as to the argument over quantity, the necessity for the use of a scale, and similar disputes - how much money and how much SPEED.

In any event, during the witness Martin's own testimony, it was established he seized the bags of brown substance from the floor of Klinkert's garage, weighed it, and sealed them as exhibits. Martin later put them in the evidence vault at the Monroe County Sheriff's Office.

At the time he placed them in the vault in the Sheriff's office, according to the Government's Exhibit No. 10, Martin filled out the upper half of a DEA Form - 7. He filled it out on or about May 30th, 1974. In Item 7, Martin described the alleged drugs as PHENTERMINE. Further, he described in Item 8, that he seized seven (7) bags of a brown substance with an approximate gross weight of twenty (20) pounds. Phentermine is a stimulant drug, or, in street language, SPEED.

Thereafter, Monroe County Sheriff's Office sent those same bags to a laboratory in New York City, where one James Winslow, on June 3, 1974, received the same seven (7) bags with seals unbroken.

Subsequently, and in the lower part of the DEA Form - 7, WINSLOW set out a record indicating the results of the laboratory analysis. The analyst was one Michael Tsougros. His signature appears at Item 31 on the form.

The first unusual fact which the analysis report reveals is that only THREE of the seven plastic bags seized contained methaqualone. Those three bags contained about fifteen (15) pounds of brown substance. Approximately six (6) pounds of the brown substance was contained in the other four bags. According to Tsougros' testimony, only after he had conducted tests on all seven bags did he conclude that four (4) of the bags contained no controlled substance :

TRANSCRIPT

Q. Could you tell the court what that conclusion was ?

A. I found that three of the bags contained methaqualone.

Q. Would you identify which three bags contained methaqualone?

A. Government's Exhibit 5, Government's Exhibit 2, and

Government's Exhibit 6. Only these three bags contained methaqualone.

Q. Only three of the bags contained methaqualone ?

A. Yes, sir .

Q. Was there any controlled substance in the remaining bags ?

A. No sir.

Q. But you conducted the same series of tests on all seven bags ?

A. Yes sir.

Furthermore, Tsougros' testimony established that, to the naked eye, and physically, there was no difference among the brown substance contained in all seven (7) bags.

TRANSCRIPT

Q. Physically, is there any difference between what you found in the white plastic bags, and between what you found in the transparent plastic bags, that is, from the physical appearance, color, feel, taste ?

. I didn't taste them, but by appearance, they all appeared to be brown resinous material.

Q. How about granular quality ? Is there a finer granu .' quality ?

A. Not that I could detect.

In addition, the witness testified that of the 7,367.0 grams contained in the three bags of brown resinous material (found to contain methaqualone) the total net weight of the PURE methaqualone was 72.14 grams, or one per nt (1%). This appears at Items 23, 24, 25, 26 and 29 of Exhibit 10. Further, Tsougros confirmed this in his testimony.

TRANSCRIPT

Q. So basically, you had to get a pure form of methaqualone in order to conduct this test. Correct ?

A. Yes sir.

Q. You have on this report a total net of 72.14 grams. And what does that represent ?

A. That represents the amount of pure methaqualone contained in these three bags.

Q. So of the 72.14 grams which those bags contained, roughly 7,140 grams are inert resins.

A. Yes sir.

Q. And the rest of it is pure methaqualone, right ?

A. Yes sir. The 7,000 grams is not necessarily just inert resins, but it is material which is not controlled.

Finally, Tsougros's testimony established that the methaqualone was inserted in the brown resin base through the process of a hydrochloride salt.

TRANSCRIPT

Q. Under Item 25 you had a hydrochloride salt ?

A. Yes sir.

Q. Is that another substance that you had to identify before you could identify the methaqualone ?

A. No sir.

Q. But there was no hydrochloride salt in the other four bags ?

A. Hydrochloride salt is simply a form of methaqualone, or any drug, that can appear in various forms, in various salt forms, and, like methaqualone, can appear as a free base, as it is called, or as methaqualone hydrochloride, or as methaqualone sulfate, whatever. In this case, in order to quantitate it, I used the per cent in the form of methaqualone hydrochloride, which is themost common form in which it is found in resinous material.

Q. Did you understand at the time you performed the test that all of this material was seized at the same time and at the same place ?

A. I assumed that to be the case, because it came in as one exhibit, but I mean I don't know for a fact how it was obtained. I don't have any idea.

Q. Can you exercise any judgment as a chemist as to what was the reason 1,700 grams of this substance had no methaqualone ?

A. No sir. it was very surprising.

Q. Highly unusual ?

A. Yes sir.

On the face of it, the Government's own witnesses, then establsihed conclusively that a reasonable man, with common intelligence, cannot, by observation of his naked eye, tell the difference between a brown resinous substance which contains methaqualone, and a brown resinous substance which does not contain methaqualone. In addition, their testimony establishes that some of the brown resins seized at Klinkert's garage (more than twenty-five percent (25%) of it) contained no methaqualone whatsoever.

Moreover, the government's exhibits themselves establish that the three bags which contained the larger quantities of the brown substance which did contain methaqualone, were wrapped in WHITE plastic bags. Also , the testimony proves that the quantities of the brown substance which did NOT contain methaqualone were wrapped in TRANSPARENT PLASTIC bags. This difference is important because, defendant HENRY's testimony at the trial was that he used only baggy type wrappers which are TRANSPARENT PLASTIC, not WHITE plastic bags. And that he had "less than ten pounds". (Tr. p. 173, 176.)

After the government's chemist found that the controlled substance involved in the transaction was methaqualone, the United States Attorney secured an indictment against the defendant, charging him with INTENTIONALLY and KNOWINGLY possessing and distributing, and conspiring to possess and distribute, that controlled substance, methaqualone, with the other co-defendants, Klinkert and Baldwin.

It should be noted at this point that both phentermine and methaqualone, in their pure state, are white powders. Accordingly, without analysis, even a chemist would be unable to detect what controlled substances, if any, a brown resin base

material contained. Finally, methaqualone is a depressant, and phentermine, a stimulant.

The witness Baldwin established that he was the one who had had all prior transactions with Agent Martin, and an undercover informer named Carmen Martucio, although he believed them to be genuine buyers. He also admitted, during his testimony, that at an earlier time he had sold some of the brown resin substance, which he had taken from the basement, to Martucio. The basement was identified in later descriptive testimony, as an area at Pennwalt known as the dead storage area.

Baldwin acknowledged that he, Klinkert and defendant Henry took the brown resin substance from the Pennwalt plant. They took it, not from the dead storage area, but from the raw material warehouse area. There was no conflict in the testimony of any of the defendants, or the other witnesses, in respect to the fact that Henry participated in the theft of the brown resin only from the raw material warehouse area, off loading dock No. 1, at the Pennwalt plant, and NEVER in the dead storage area.

The testimony established conclusively that the theft of the brown resin occurred toward the end of February, 1974. This is a very important date, because Dr. William F. Head's testimony establishes that the methaqualone on the premises at Pennwalt was destroyed, under the supervision of the Drug Enforcement Administration, in January, 1974, one month BEFORE the theft.

The most that could be extracted from any of the two witnesses, Klinkert and Baldwin, was that Henry and Baldwin did not know what the brown substance was, but that Baldwin thought it was PHENTERMINE.

Baldwin specifically testified that at no other time did he steal any substance with Henry, and at no other time did he attempt to sell any of the brown substance which he stole with Klinkert and Henry.

Under this factual testimony, the government had to prove beyond a reasonable doubt, the following elements :

> On the first count : Defendants Henry, Baldwin and Klinkert agreed, knowingly and willfully, to take quantities of methaqualone from the Pennwalt plant in Henrietta, and sell it, to someone else, knowing at the time that it was a controlled substance.
>
> As to count two : The government had to prove that defendant Wayne F. Henry, knowingly and intentionally, IN FACT, distributed 7,300 grams of a substance which contained methaqualone.
>
> As to count three : That Henry did, knowingly and intentionally , possess, with intent to distribute and dispense, 7,300 grams of a substance which he knew contained methaqualone.

The most important factual witness, accordingly, in respect to these degrees of proof, is Dr. William F. Head, an employee of Pennwalt Corporation.

TRANSCRIPT OF TESTIMONY OF DR. HEAD

Q. So when you purchased or procured methaqualone, you procured it already in a pure state?

A. That's correct.

Q. Now, in the pure state, as a chemist, it is what, approximately ninety percent (90%) ? What percent pure?

A. Around ninty-eight percent (98%) pure or better.

Q. And, of course, the color at the time it comes into your plant is white, isn't it ?

A. That's correct.

Q. A white powder, is that correct?

A. That is correct.

Q. Did there come a time when Pennwalt ceased using methaqualone?

A. Yes there did.

Q. Could you tell me when it was.

A. WE CEASED USING METHAQUALONE ON FEBRUARY 28, 1973.

Dr. Head also established that Pennwalt used the pure white powder in a manufacturing process by combining it with the brown resin. There were no visible traces of white powder after this process was complete. The percentage of methaqualone in the brown powder was approximately twenty percent (20%) of the gross weight.

TRANSCRIPT

Q. Would it be possible after this blending occurred, through the use of hydrochloric acid, and the soaking and drying process, - would it be possible to the naked eye to determine whether that brown inert resin had methaqualone inserted in it or not ?

A. No, I do not think it would.

Q. The naked eye could not tell, right ?

A. No sir.

Q. It would require chemical examination?

A. I t would

Q. How much proportion is the methaqualone to the resin in your production schedule? Can you tell me by weight ?

A. It would be approximately one-fifth, -- one-fifth methaqualone, four-fifths resin. The final specifications of the methaqualone resin, it is approximately twenty percent (20%) methaqualone.

Q. When you take it up to the blending area, the methaqualone would be liquefied with acid, hydrochloric acid, is that correct?

A. It would be dissolved in a solution of hydrochloric acid.

By this testimony, Dr. Head established that, at least at the Pennwalt plant, methaqualone processed brown resins were twenty percent (20%) methaqualone, eighty percent (80%) inert brown resin, and that a hydrochloric salt base process was used.

This testimony should be compared with Government's Exhibit 10 in evidence, which shows, in Items 26 and 27, that the brown resin seized at Klinkert's garage contained but one perce .1%) methaqualone. That is, it contained 72 grams out of roughly 7,200 grams. One fair inference from this evidence is that the brown resin which was seized was not brown resin in Pennwalt's ordinary manufacture. Furthermore, Dr. Head established that in 1972 , different methods of handling methaqualone were adopted at the Pennwalt plant.

TRANSCRIPT

Q. Where would it (methaqualone) be delivered ?

A. It would be delivered at our east dock in Building No. 1.

Q. And the, where would that be taken once the delivery occurred?

A. After the material is received off the truck, the material is physically transferred into the dock premises themselves, and then the material (objections omitted) is then moved to a secure area for storage.

Q. When you say " secured area" could you describe it ?

A. The secure area has varied with methaqualone in history. At one time, prior to approximately the fall of 1972, we stored the methaqualone after its weighing and sampling, in the raw material warehouse area, and this is a locked area. It is not a secure area in the sense of alarms and detection devices. After approximately the fall of 1972, we moved the methaqualone storage area to our security area, which is an area which is not only locked, but is "alarmed and tape-wired" and so forth.

Q. And is it guarded ?

A. During normal business hours, yes, these areas are under supervision.

Q. And after normal business hours, what happens in the secured area ?

A. In the security area, after normal business hours, the alarm systems are turned on. These are ADT protected areas, and the areas are locked, and the alarms are turned on. There may be multiple alarm devices in these areas.

Moreover, Dr. Head established that, after the blending process had united the methaqualone and the brown resin, the product was stored on the premises at Pennwalt. The storage procedure, prior to the fall of 1972, was different from the storage procedure after the fall of 1972.

TRANSCRIPT

Q. Now where is that stored after the blending process has been completed ?

A. That material was stored prior to the fall of 1972, in the raw material warehouse.

Q. And after the fall of 1972 ?

A. It was secured in our security area.

Q. With the alarms and so forth ?

A. That's right.

Q. So it is a fact, isn't it, that it is only prior to 1972 that an employee could have access to the methaqualone complex in the raw materials storage area, 1972, or prior thereto ?

A. That would be correct.

And , even on re-cross examination by Mr. Welch, Dr. Head continued to maintain that AFTER JANUARY, 1974, the only area in which methaqualone, united in a brown resin could be located on Pennwalt's premises, was in the deat storage locker area. This is his testimony :

TRANSCRIPT

Q. Just tell me whether or not this is so: In addition to the raw materials area, prior to 1972, also in the area where it is processed and dried, and also in the

dead storage locker, an electrical maintenance employee would have access to methaqualone in that state, is that not true ?

The Court: We are not much concerned with what was the condition before 1972. This happened in 1974.

Q. In 1974, electrical maintenance workers would have access to methaqualone in that state as in G-2, G-5 and G-6 in what areas ?

A. Only in the dead storage area, totally, just the dead storage area.

Q. They would not have access to it in the drying area?

A. No, because in January, 1974, we destroyed, under DEA supervision, all of the methaqualone base, to free pure material, and all of the methaqualone resin complex, that we had in the house. All of our production inventories were destroyed totally under DEA supervision.

Q. When you " under DEA supervision" what does that mean?

A. That means an agent of the Drug Enforcement Administration, and usually from the Buffalo District Office, comes to our plant and personally attends to, and supervises, the destruction of that material.

Q. But he does not inventory everything you had in methaqualone prior to watching it being destroyed .

A. Yes, he does, and signs an inventory statement for it, and we have to weigh this material for him, and so forth.

This testimony, of course, establishes that after early January, 1974, all the methaqualone complex in the brown resins had been destroyed. The only place where such a controlled substance as methaqualone in the brown resin complex could be found, on the Pennwalt premises, was in the DEAD STORAGE AREA.

This theft occurred in February, 1974. It did NOT occur in the dead storage area. Therefore, Henry never stole, nor dispensed, methaqualone complex.

CONCLUSION

For the foregoing reasons, Appellant prays that the judgment be reversed, and the indictment dismissed.

Respectfully submitted,

JOHN MANNING REGAN, ESQ.
Attorney for Defendant-Appellant
Office and P.O. Address
711 Wilder Building
Rochester, New York 14614